

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

NOLBERTO BELTRAN PEREZ,

Defendant and Appellant.

F057165

(Super. Ct. No. F08904677)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

Sylvia Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Clara M. Levers, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

PROCEDURAL HISTORY

Appellant Nolberto Beltran Perez was convicted by jury of transportation for sale of heroin (count 1), transportation for sale of cocaine (count 2), possession of heroin for sale (count 3), possession of cocaine for sale (count 4), and driving without a license (count 5). At sentencing, the trial court refused Perez's request for probation and sentenced him to the mid-term of four years on count 1 and a concurrent mid-term of four years on count 2. A three-year concurrent middle term was imposed on both counts 3 and 4, but these terms were ordered stayed pursuant to Penal Code section 654. On count 5, the trial court sentenced Perez to 299 days with credit for time served.

FACTUAL SUMMARY

Perez is a Mexican national and was, at the time of his arrest, in this country illegally. Perez's father, wife of 20 years, and two children (ages 11 and 18) live in Mexico. Perez's mother and three siblings live in Lodi. Perez had not seen his father, wife, or children since leaving Mexico a year before his arrest. He had not seen his mother and siblings for six months. At the time of his arrest, Perez was working in the fields and living in a truck in Fresno with friends. He had been in the area for six months and in the country for one year at the time of his arrest.

Perez was arrested after police officers stopped the car he was driving after observing routine traffic violations. Perez did not have a California driver's license and was arrested as a result. During a search of the car, the arresting officers found 253 foil bindles of black tar heroin and 36 paper bindles of cocaine. During the stop and investigation, Perez's cell phone rang constantly.

Although Perez claimed he had gone to purchase the drugs for himself and his friends for personal use, the jury rejected this contention and found the possession was for sale.

DISCUSSION

I. Denial of probation

Perez contends that the trial court violated his federal and state constitutional rights to equal protection and due process by denying his bid for probation on the ground that he is illegally in the United States. If not, Perez contends that the trial court abused its discretion in denying him probation. Respondent counters that Perez has forfeited this issue by failing to raise it at sentencing. Perez disagrees, but argues if this court finds forfeiture, then he was denied effective assistance of counsel. Since we conclude there was no error, we do not address the forfeiture issue or the ineffective-assistance-of-counsel claim.

The trial court heard and considered all the factors in support of and in opposition to probation. After hearing the argument of counsel, reading the probation report, and hearing the statements of Perez and Perez's sister at the sentencing hearing, the trial court decided against granting Perez probation. We have reviewed the trial court's statements in their context and conclude there is no constitutional violation and no abuse of discretion.

We disagree that Perez was denied probation "solely" because he was an illegal alien. Perez's illegal status was only one factor considered in denying probation. The court's primary concern appears to have been the quantity of drugs Perez possessed and his intention to sell the drugs in the community. The trial court explained that, although Perez claimed the drugs found in his possession were for personal use, the jury concluded that the drugs were possessed for sale, and the court was going to accept that finding. It noted the large quantity of drugs found in Perez's possession. The court stressed the danger of this behavior to the community. In other words, Perez's lack of criminal record is offset by the seriousness of his offense. (See Cal. Rules of Court, rule 4.414(a)(1) & (b)(1).)

Further, the court's reference to Perez's illegal status led directly to the court's consideration of Perez's lack of ties to the community and his likely inability to comply with the terms of probation, both proper factors for evaluating whether probation should be granted. (*People v. Sanchez* (1987) 190 Cal.App.3d 224, 230-232; see also *People v. Cisneros* (2000) 84 Cal.App.4th 352, 358; Cal. Rules of Court, rule 4.414(b)(4).) The court noted that Perez's family was in Mexico. Despite appellant's counsel's assertion that Perez had "strong local ties" to the community, the record establishes the opposite. Perez had been in Fresno only six months and had been in the country only one year prior to his arrest. He told police he lived in his truck. Further, he had not obtained a California driver's license. There was no showing of stable employment, other than evidence that Perez worked in the fields. These are not the earmarks of a stable tie to the local community. Although Perez had a mother and siblings in Lodi, four counties¹ away, he had not seen them for six months. His immediate family, a wife of 20 years and two children, one still a minor, were in Mexico. According to the sister's statement, prior to Perez's arrest, Perez was sending the family money. He still had strong ties to Mexico.

Perez's status as an illegal alien is a proper consideration in determining whether to grant probation. (*People v. Sanchez, supra*, 190 Cal.App.3d at pp. 229-230.) The courts have consistently recognized that, although illegal aliens may claim the benefit of the Fourteenth Amendment's guaranty of equal protection, legal residents of the United States and illegal residents are not similarly situated and therefore there is no requirement under the law that they be treated alike. (*People v. Sanchez, supra*, at p. 229; *People v. Espinoza* (2003) 107 Cal.App.4th 1069, 1074-1075; *People v. Cisneros, supra*, 84 Cal.App.4th at p. 358.) The court was free to presume that, once Perez was released, he would face deportation and would most likely be unable to comply with the terms of

¹Heading north on State Highway 99 from Fresno to Lodi, one would pass through Madera, Merced, Stanislaus, and San Joaquin counties.

probation. (*People v. Sanchez, supra*, 190 Cal.App.3d at p. 230 [defendant's status as illegal alien is highly relevant to whether to grant probation because it bears directly on whether defendant can comply with probation terms]; *People v. Espinoza, supra*, at pp. 1074-1075 [strong probability that defendant will be deported will likely frustrate objectives of probation]; accord, *People v. Galvan* (2007) 155 Cal.App.4th 978, 984-985.)

We conclude that the trial court exercised sound discretion, after considering proper factors, when it concluded Perez was not a suitable candidate for probation. We are not concerned that the trial court did not hear from the drug treatment counselor. Once the court concluded that Perez's illegal-alien status would make it difficult if not impossible for him to comply with the terms of probation, including completion of any drug treatment program, the court was not obligated to hear details about the program suggested by the defense. A trial court abuses its discretion when its order granting or denying probation exceeds the bounds of reason under all of the circumstances, or it exercised its discretion in an arbitrary or capricious manner. (See *People v. Warner* (1978) 20 Cal.3d 678, 683; *People v. Edwards* (1976) 18 Cal.3d 796, 807.) Under these circumstances, the failure to hear the evidence did not render the court's decision arbitrary or capricious.

II. Abstract of judgment

The trial court ordered that the sentences imposed on counts 3 and 4 be stayed pursuant to Penal Code section 654. The abstract of judgment does not accurately state the trial court's sentence and must be corrected. We order that the abstract be modified to correctly reflect the court's judgment. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

The judgment is affirmed. The abstract of judgment shall be modified to reflect that the sentences imposed on counts 3 and 4 were stayed pursuant to Penal Code section 654. Copies of the corrected abstract shall be distributed to the appropriate authorities.

Wiseman, J.

WE CONCUR:

Vartabedian, Acting P.J.

Gomes, J.